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Case No.: **2000-LHC-2888**

OWCP No.: **5-105889**

In the matter of

HERMAN E. PERRY,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer/Self-Insured,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia, on May 23, 2001, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based, upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

The Claimant and the Employer have stipulated to the following:

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers* Compensation Act;

2. An Employer/Employee relationship existed at all relevant times;

3. That claimant suffered an injury to his right knee arising out of the course of employment as a result of the cumulative trauma diagnosed February 3, 1999. (Tr. 5).

4. That there was a timely first report of injury and timely notice of controversion.(Tr. 5).

5. That claimant timely filed a claim. (Tr. 5).

6. (a) That as a result of the injury the employee was temporarily and totally disabled from March 11, 1999 to December 7, 1999 inclusive, entitling him to compensation for 38 6/7 weeks at $399.26 per week, amounting to $15,514.10.

   (b) That as a result of the injury the employee has sustained permanent partial disability equivalent to 55% loss of use of the right leg for which he is entitled to compensation for 158.40 weeks (55% of 288 weeks) at $399.26 per week, amounting to $63,242.78.

7. That the sum of the compensation under Section 6(a) and (b) is $78,756.88, of which the employer and carrier have paid $25,381.51 (at the time of June 14, 2000 agreement). (EX 19).

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[1] *The following abbreviations will be used as citations* to the record:

JS - *Joint Stipulations;*
TR - *Transcript of the Hearing;*
CX - *Claimant*s Exhibits; and*
EX - *Employer*s Exhibits.*

8. That as a result of his work related right knee injury, claimant cannot return to his pre-injury job as a chipper. (Tr. 5).

9. That the employer furnished the employee with medical services in accordance with the provisions of Section 7 of the Act.

10. That the average weekly earnings of the employee at the time of the injury were $598.88.

Issue

Entitlement to permanent total disability from December 8, 1999 and continuing.

Contentions

The Claimant states that he

sustained injuries to his right knee while working for the Shipyard for which he came under the care of Dr. Thomas Stiles and whom performed surgery on claimant*s right knee in March 1999. Subsequent to that surgery and pursuant to permanent restrictions to his right knee, claimant was unable to perform his pre-injury work at the shipyard. The employer paid disability benefits until December 8, 2000 at which time, relying upon a labor market survey, they discontinued payment of benefits.

Claimant asserts by this brief that the labor market survey relied on by the employer is insufficient to establish suitable alternative employment and that claimant diligently sought work to no avail and thus is entitled to permanent total disability benefits from December 8, 1999 to the present and continuing.

In this case, the employer has presented a labor market survey compiled by William Kay and has presented the testimony of three employers who assert that they would consider Mr. Perry for a security guard or a goodwill donation center attendant. Claimant asserts that none of this evidence establishes that availability of suitable alternative as the labor market survey is invalid because it does not include

claimant*s current work restrictions, the labor market survey does not establish the availability of work and the employers production of three witnesses that now assert they would have considered Mr. Perry for jobs does not establish the availability of suitable alternative employment.

The Employer states that at trial it

brought to testify three employers who were ready, willing, and able to hire the Claimant if he simply showed some motivation to apply and to perform the work. The Claimant repeatedly turned down Employer*s offer to Claimant during litigation to at least try one of the available jobs identified (Tr. at 110), stubbornly maintaining that he is justified in refusing to even try suitable and appropriate employment because he previously failed in a job placement program.

Even with his permanent work restrictions, the Claimant is able to work at a number of specific positions with his physician*s approval. Because Claimant has a permanent impairment rating and restrictions for full-time work; because the Employer has established the existence of suitable alternate employment, which existed between December 8, 1999 and continuing; and because the Claimant failed to pursue such employment with due diligence, the stipulations previously entered into should be found supported by substantial evidence and accepted, and the Claimant should not be found entitled to permanent total disability benefits from December 8, 1999 and continuing.

The Claimant*s alleged efforts to find employment, aside from “surviving” through Job Club, are dubious at best and not documented at all. The Claimant has testified in answers to interrogatories that the only jobs he looked for were those documented in the Job Club records and testified he would “forward my other job search records at a later date” (E-16b; Tr. at 101). Clearly, from this testimony and his hearing testimony above, he knew he was supposed to “document” his job search to establish due diligence, and clearly he did not (Tr. at 101).

His self-serving testimony, despite his failed obligation to disclose it in the discovery responses

> and over a well-grounded objection to its admissibility (Tr. at 90-97), amounts to no more than a paltry stratagem designed to masquerade Claimant*s lack of true motivation or interest in working any longer. The Claimant has essentially conceded that he has no proof at all that he conducted an independent job search and accordingly, no proof should be found to exist (Tr. 105-106).

Evaluation of the Evidence

In March 1999, Dr. Stiles performed an arthroscopy and arthroplasty of the right knee. (CX 3). The Claimant underwent physical therapy during the next two months. (CX 4). Dr. Stiles saw Perry on numerous occasions in 1999 and in 2000.

On November 3, 1999, Dr. Stiles assigned permanent restrictions. Perry was allowed to climb stairs to and from the job and crawling, kneeling, and squatting were prohibited. Perry could stand up to 2.5 hours per day but could not bend or twist. The Claimant could lift 30 pounds and carry the weight for 50 feet. (CX 2).

In December 1999, Dr. Stiles stated that Perry had a 55% permanent impairment in the right lower extremity (RLE). In March 2000, it was reported that the Claimant had been referred to Dr. O'Connor (SIC). (CX 1; EX 8).

Dr. O'Connell examined Perry in January 2000 and reported that the Claimant had reached maximum medical improvement (MMI). Dr. O'Connell stated that with Mr. Perry's present degenerative changes, I think the appropriate treatment would be a total knee replacement. In May 2000, the physician stated that there was a 50% impairment in the RLE. (EX 7).

In October 2000, Dr. Stiles reported that

> patient is in for follow up on his knees. He brought in X rays of his left knee made in the NNSY on Feb 1999. These show marked collapse of his medial compartment with narrowing of his patella femoral compartment as well. There are some arthritic changes along the medial border of his tibia and femur laterally and along the borders of his patella as well. He has 2mm of cartilaginous space in his patella femoral joint and zero in his femoral tibial joint.

> It is my opinion that as a result of both his knee problems, the fact that he has to ambulate with a cane and his chronic pain in both knees, that he has a rather marked amount of disability that will not allow him to return to any type of working situation in which he has to be on his feet for any extended period of time, more than 20-30 minutes at a time. He will not be able to crawl, kneel, squat, or climb. He also has constant pain in both knees, which will inhibit him from doing seated work for an extended period, he would need to get up and move about at least 3-4 times and hour. (CX 1).

In November 1999, Dr. Tornberg assigned the same restrictions as were written by Dr. Stiles at that time. In November 2000, Dr. Luck made comments regarding use of the AMA guides.

At the hearing, Perry testified that he injured both knees in February 1999. Perry stated that Dr. Stiles changed restrictions in late 2000 to indicate that Perry could not sit for a long time due to pain and stiffness in the knees. (TR 70).

He reported that he participated in the shipyard job club and went to all the employers that were mentioned. However, he was not offered work by anyone. The employers included Hertz and Atlantic Protective Services. (TR. 78 & 79).

In August 2000, William Kay, a vocational consultant, conducted a labor market survey. Kay identified jobs as an unarmed security guard, as an auto parts deliverer, as a rental car shuttlerer, as a van driver for 7-11 employees, as a donation center attendant, and as a WalMart greeter. Dr. Stiles approved jobs as a shuttlerer, as a van drier, and as a donation center attendant. He approved the security jobs if they would be minimal walking and standing. (EX 10).

At the hearing, Employer’s counsel stated that he submitted Kay’s list of potential employers’ to the Claimant and his counsel in August 2000. The Claimant signed a certified receipt in that month. (TR. 83). Perry stated that he went to some of the identified companies but did not keep records. (Tr. 92).

Kay testified that his 2000 report was based on limitations assigned by Dr. Stiles in November 1999. Kay described numerous jobs with Security Services of America, with Top Guard, and with James/York Security. He also mentioned jobs as a shuttlerer, as a van driver, and as a donation center attendant. Kay testified

that the above mentioned jobs were within the restrictions reported by Dr. Stiles in late 2000. (Tr. 33).

Billy Fite testified that he was the Goodwill Industries manager. He reported that Perry was suitable as a donation center attendant and would not have to lift over his assigned restrictions. (Tr. 62).

Marc Cooper, a vocational consultant, testified that OWCP asked him to meet with Perry and they met in August 2000. The Claimant's IQ was 81 and his reading and math skills were no more than the third grade level. Cooper had seen Dr. Stiles' 2000 report. Cooper felt that many of Kay's jobs required too much sitting at one time and that Perry's abilities were to low to be a guard. Cooper felt that Perry was unemployable. (Tr. 167).

William Hill described various positions with James/York Security. Hill stated that Perry would be a candidate to be a night monitor in a hotel for school groups on trips. The company also guarded tent sale sites and had other openings. Winter work might be reduced to about 20 hours per week. None of his employees had ever failed the state test for guards. (Tr. 177).

Charles DeMark, a rehabilitation counselor, testified that he met with Perry in January 2001. Testing showed low average IQ and learning skills at about the third grade level.

DeMark testified that Perry was not a candidate for vocational rehabilitation services based on his age, his lack of education, his lack of transferrable skills, the issues of competition for workers -- it*s my opinion that those things taken - create a situation where Mr. Perry would not be feasible for vocational rehabilitation services. Feasibility in vocational rehab involves the idea of whether the services could be reasonably expected to result in a person being able to return to work. And it*s my opinion that Mr. Perry would not be able to return to work in competitive employment in his labor market.

> ... I believe that he cannot compete. For example, I believe the only way Mr. Perry would be able to return to work is with some type of benevolent employer. (Tr 112 & 113).

When deposed in December 2001, Gary Cote testified he was a branch manager for Security Services of America. Cote stated that he had a contract with Liberty Baptist Church to provide 168 hours of security a week. This entailed minimal walking, and

there were gate guard positions at Chesapeake Bay Packing for 113 hours per week. In addition, there were positions as security guards for tour groups in hotels. Other jobs required more walking and were unsuitable for the Claimant. (EX 20).

Mr. DeMark's report in January 2001 stated in part

> Mr. Perry is a sixty-one year old gentleman who has worked as a shipyard laborer for thirty-eight years. His previous work history is labor intensive as well. He has few transferable skills. He is illiterate. He has sedentary/light restrictions. While there are low unemployment rates, there are currently over 17,000 people registered with the Virginia Employment Commission looking for work in the Tidewater area. Mr. Perry is not in a position to be competitive for any positions that are appropriate for his physical restrictions, given his other vocational deficits. It is my opinion that Mr. Perry*s wage earning capacity is zero. (CX 11).

In March 2001, DeMark stated that he had reviewed Kay's report. DeMark reported that he had talked to Wackenhut Security, to City Wide Security, and to Top Guard Security. He concluded that

> Based on Mr. Perry*s restrictions, illiteracy, and medical need to avoid physical confrontations, security work is not feasible or appropriate for him, nor would he be considered for openings by cautious employers.

DeMark spoke with Thrifty, Hertz, and Auto Zone and felt that these jobs required excessive sitting, lifting, carrying and climbing. WalMart Greeters and donation center attendants performed activities beyond Perry's abilities. (CX 12).

Discussion

To establish a prima facie case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury.

The Employer does not dispute the fact that Claimant is unable to return to his former employment because of his work-related injury. Therefore, Claimant established a prima facie case of permanent total disability.

Thus, the burden shifts to Employer to show suitable alternate employment. Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988); Nguyen V. Ebbtide Fabricators, 19 BRBS 142 (1986). A failure to prove suitable alternate employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989) (involving injury to a scheduled member); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986), aff*d, No. 86-3444 (l1th Cir. 1987) (unpublished).

Kay has stated that jobs with National Car Rental, as a WalMart greeter, as a 7-11 van driver, and as a donation center attendant are available and within Perry's restrictions.

According to DeMark, jobs with Thrifty and Hertz require extensive lifting and driving. Thus, work with a rental car company is not available. While Dr. Stiles approved jobs a a greeter and as an attendant, I am persuaded by DeMark these jobs are not appropriate.

Dr. Stiles approved security jobs with limited walking and sitting. DeMark has indicated that three security firms would not consider Perry because of restrictions and other limitations.

However, managers of two security firms testified that they would hire someone of Perry's caliber and that they had suitable work for him.

Therefore, I conclude that the Employer has demonstrated suitable alternate employment. Thus, pursuant to Potomac Electric Power Co. (PEPCO) v. Director, OWCP, 449 U.S. 268 (1980) neither permanent total disability nor permanent partial disability is in order.

ORDER

1. The Claimant is not entitled to non-scheduled compensation benefits after December 7, 1999.

2. The Employer will pay schedular compensation pursuant to Stipulations # 6 and #7.

3. Employer shall receive credit for all compensation that has been paid.

4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits

computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

5. All computations are subject to verification by the District Director.

6. Pursuant to Section 7 of the Act, Employer shall provide such medical treatment as the nature of Claimant*s work-related disability requires.

A
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/CCB/ccb
Newport News, Virginia